

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 404 of 1998

with

CIVIL APPLICATION No 7495 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA Sd/-

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1. Whether Reporters of Local Papers may be allowed : NO  
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO  
1 to 5 No

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MAHESHKUMAR GORDHANDAS VYAS

Versus

STATE OF GUJARAT

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Appearance:

MS MITA S PANCHAL for Appellant

NOTICE SERVED BY DS for Respondent No. 1

MR MH RATHOD for Respondent No. 2, 3

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CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 16/08/1999

ORAL JUDGEMENT

ADMITTED. With consent of the learned advocates  
appearing for both the parties, this matter is taken up

for hearing and final disposal today.

2. In this Appeal from Order, the appellant herein has brought in challenge the judgment and order dated 31.1.1998 recorded in Misc. Civil Application No.83 of 1993 by learned Civil Judge (S.D.), Morbi whereby he has dismissed the application filed by the appellant against the respondents for claiming the relief of restoration of Regular Civil Suit No.281 of 1983 under the provisions of Order 9 Rule 9 of the Civil Procedure Code, 1908.

3. The present appellant is the applicant-plaintiff while the respondents are the opponents-defendants and for the sake of brevity and convenience, they are hereinafter referred to as 'plaintiff' and 'defendants' respectively.

4. The plaintiff filed Regular Civil Suit No.281 of 1983 against the defendants for the relief of declaration and injunction. The said suit was proceeded with in the lower Court and, on the day of the hearing of the suit, the plaintiff remained present and he presented a vakalatnama of his advocate, who remained absent. However, the learned trial Judge dismissed the said suit under the provisions of Order 9 Rule 8 of the CPC on the ground that so many adjournments had been granted to the plaintiff and even then he went on changing his lawyer who remained absent and that the suit was of the year 1983.

5. Aggrieved thereby, the plaintiff filed Misc. Civil Application No.83 of 1993 under the provisions of Order 9 Rule 9 of the CPC for restoration of the original suit. The said application was contested by opponents Nos.2 & 3 and the learned trial Judge after considering the submissions advanced by both the parties recorded the order dismissing the application on the ground that, since the suit was dismissed under the provisions of Order 17 Rule 3 (A) of the CPC, provisions of Order 9 Rule 9, which is for restoration, shall not apply and resultantly he dismissed the application.

6. I have heard learned advocate Ms.Mita Panchal for the appellant and learned advocate Mr.Mehul Rathod for the respondents. On perusing the order of dismissal of the suit, it can be seen that, on the day of hearing of the suit, i.e. 9.12.1993, the plaintiff remained present and he also presented vakalatnama of his lawyer Mr.J.R.Batti, who remained absent. Therefore, the learned trial Judge dismissed the suit under the provisions of Order 9 rule 8 of the CPC since the suit

was pretty old and was of the year 1983. Now, on perusing the order impugned, it is stated therein that the concerned Judge has dismissed the suit under the provisions of Order 17 Rule 3 (A) of the CPC since the plaintiff was present. Therefore, the learned trial Judge, who has decided the application, has recorded a contrary finding while dismissing the suit and resultantly he recorded an erroneous conclusion that since the suit was dismissed under the provisions of Order 17 Rule 3 (A), an application under Order 9 Rule 9 was not maintainable.

7. In view of the aforesaid, since the suit was dismissed under the provisions of Order 9 Rule 8, the proper procedure for restoration would be under the provisions of Order 9 Rule 9 only, therefore, the finding recorded by the learned trial Judge is erroneous. It is a settled principle of law that a party who comes in a Court of law must get justice after giving ample opportunity of pleading his case and the principle of audi alteram partem should be adhered to while delivering justice.

8. In the aforesaid premise, the order recorded by the learned trial Judge is bad in law, and as such the same deserves to be quashed and set aside by granting the restoration application filed by the applicant under Order 9 Rule 9 of the CPC and to restore the suit to its original file.

9. In the net result, the Appeal from Order is allowed, of course, with no order as to costs. The judgment and order recorded by the learned trial Judge in Misc. Civil Application No.83 of 1993 is quashed and set aside by allowing the said application and restoring Regular Civil Suit No.281 of 1983 to its original file.

10. In view of the above, there shall be no order on Civil Application No.7495 of 1998. Notice issued therein shall stand discharged, however, with no order as to costs.

11. It is unfortunate that Misc. Civil Application No.83 of 1993 was decided on 31.1.1998, i.e. after five years of its presentation and since Civil Suit No.281 of 1983 is pretty old, it is expected of the learned Civil Judge (S.D.) to give expeditious hearing of the said suit and he shall decide the same latest by 30.4.2000 by giving opportunity of leading evidence to both the parties. It is hoped that the plaintiff would cooperate for expeditious hearing of the suit by giving his

evidence as early as possible without seeking any  
adjournment.

(KMG Thilake)

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